Before the
Federal Communications Commission
Washington, D.C.

In the Matter of	)	
	)	
GAME SHOW NETWORK, LLC,	)	MB Docket No. 12-122
Complainant,	)	File No. CSR-8529-P
	)	
v.	)	
	)	
CABLEVISION SYSTEMS CORP.,	)	
Defendant	)	

TO: The Commission

CABLEVISION SYSTEMS CORPORATION'S REPLY BRIEF IN FURTHER SUPPORT OF ITS APPLICATION FOR REVIEW OF THE HEARING DESIGNATION ORDER

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In its application for review, Cablevision Systems Corporation ("Cablevision") showed that Game Show Network, LLC ("GSN") filed its carriage complaint nearly a decade late in violation of the applicable statute of limitations.[1] GSN's opposition ignores and misinterprets precedent in arguing that the carriage complaint was timely. A proper application of that precedent should lead the Commission to grant Cablevision's application for review and dismiss GSN's untimely complaint on statute of limitations grounds.[2]

The crux of GSN's flawed argument is that "a Section 616 complaint is timely if filed within one year of the required notice from a programmer to an MVPD of its intention to file a Section 616 complaint and within one year of the allegedly discriminatory act complained of."[3] It is undisputed that GSN's carriage complaint would be timely *if that were the governing standard.* It is not. As laid out in Cablevision's application for review, a carriage complaint is timely if filed within one year of: (1) a discriminatory contract; (2) a discriminatory offer of carriage; or (3) a discriminatory refusal to negotiate.[4] No evidence has been presented to the Commission that would satisfy this standard, and GSN has not even argued that its carriage complaint is timely under any fair reading of this rule.

Instead, GSN relies on three 2008 decisions by the Media Bureau and the Commission's decision in *Tennis Channel*—later overturned by the D.C. Circuit—to support its preferred interpretation of the governing statute of limitations. But decisions by the Media

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1 47 C.F.R. § 76.1302(f). The statute of limitations now appears, without alteration, at 47 C.F.R. § 76.1302(h). This brief refers to the rules in place when GSN filed its claims.

2 This reply brief is filed in accordance with 47 C.F.R. § 1.115(d)–(f).

3 Game Show Network, LLC's Opposition to Application for Review of the Hearing Designation Order at 1–2, *Game Show Network, LLC* v. *Cablevision Systems Corp.*, MB Dkt. No. 12-122 (filed Jan. 9, 2017) ("Opposition").

4 47 C.F.R. §76.1302(f)(1)-(3); *Comcast Cable Commc'ns* v. *FCC*, 717 F.3d 986, 996 (D.C. Cir. 2013) (Edwards, J., concurring) ("*Tennis Channel*").

Bureau are not Commission precedent.[5] Indeed, Judge Edwards concluded in *Tennis Channel* that "[t]hese Media Bureau decisions are not controlling here because their reasoning was never affirmed by the Commission."[6] Further, and most significantly, GSN's reliance on the Commission's decision in *Tennis Channel* is misplaced in light of its reversal by the D.C. Circuit and Judge Edwards' concurrence explicitly rejecting the same theory presented by GSN here.[7]

GSN's effort to distinguish *Tennis Channel* fails. GSN argues that the facts in *Tennis Channel* are different than the circumstances here because Cablevision reduced GSN's carriage, while Comcast refused to expand Tennis Channel's carriage. This is a distinction without a difference: in both cases, the complaining network suffered an adverse carriage decision. And, as the FCC and the courts have recognized, *inaction* by an MVPD can lead to carriage complaints in the same way as an *act* of alleged discrimination.[8] GSN provides no persuasive reason why this distinction matters, and, moreover, fails to confront the core reasoning of Judge Edwards' rejection of GSN's position as "incomprehensible" and inconsistent with the "longstanding construction of subsection (f)(3)."[9]

In an effort to bolster the decision by the Media Bureau in this case, GSN also invokes the longstanding principle that "an agency's interpretation of its own procedural rules is

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5 *Comcast Corp.* v. *FCC*, 526 F.3d 763, 769–70 (D.C. Cir. 2008) ("[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions. . . . [U]nchallenged staff decisions are not Commission precedent.").

6 *Tennis Channel*, 717 F.3d at 1002 (Edwards, J., concurring).

7 The position adopted by GSN is particularly disingenuous as GSN is represented by the same counsel who presented the statute of limitations argument in *Tennis Channel* that Judge Edwards rejected.

8 47 C.F.R. § 76.1302(f)(3); *Tennis Channel*, 717 F.3d at 999–1002 (Edwards, J., concurring).

9 *Tennis Channel*, 717 F.3d at 995–96 (Edwards, J., concurring).

accorded maximum deference."[10] But this principle does not apply here, since "[a]n agency's interpretation of its own regulation is entitled to no deference if it has, 'under the guise of interpreting a regulation, [created] *de facto* a new regulation.'"[11] As Judge Edwards explained in *Tennis Channel*, the position adopted by GSN is nothing more than an effort "to rewrite [the FCC's] regulations without following the applicable notice-and-comment procedures required by the APA."[12] Contrary to GSN's suggestion, the pending rulemaking concerning Section 616's statute of limitations does not mean that the Commission is trying to "codifi[y] the way in which the rule has been consistently interpreted"[13]—rather, it demonstrates that GSN's preferred interpretation is *not* settled law.

This application for review should be granted because the decision below is contrary to the consistent interpretation of 47 C.F.R. § 76.1302(f). Any carriage complaint centered upon alleged discrimination related to contractually-permitted action must be brought within one year of the execution of that contract. GSN brought a complaint nearly a decade after the parties entered into an agreement giving Cablevision the right to move GSN to a different tier, which is the crux of the claim of discrimination in this case. As a result, GSN's complaint is time-barred.

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[10] Opposition at 1. GSN's attempt to support its position with legislative history is similarly unavailing. Not only does the legislative history fail to support GSN's expansive interpretation, but GSN utterly fails to address the regulatory history of Section 616 which, as explained by Judge Edwards, is wholly inconsistent with GSN's interpretation. *Tennis Channel*, 717 F.3d at 999–1006 (Edwards, J., concurring).

[11] *Tennis Channel*, 717 F.3d at 999 (Edwards, J., concurring).

[12] *Id.* at 1006.

[13] Opposition at 5.

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Respectfully submitted,

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